

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Italy

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In 2023, almost all economic sectors were impacted by the public enforcement of competition law of the Italian Competition Authority (“ICA”) and by judgments of Italian courts. As for previous years, we will summarise below the cases that we deem the most noteworthy, without any aspiration of being exhaustive, starting from the organizational and legal framework.

A revamped ICA

At the beginning of 2023, the ICA adopted a [new organizational structure](#), which notably entailed the establishment of two separate departments entrusted with enforcement responsibilities in antitrust matters (in addition to seven departments with powers in other policy and horizontal support areas, including consumer protection and legal-economic affairs). The new organizational structure also resulted in the creation of a Directorate for competition matters of digital platforms and communications, thereby confirming the ICA’s focus on this sector. Later in 2023, also a Directorate of concessions and local public services was established, with the aim of empowering the ICA with additional resources to also assist public authorities in the implementation of the national recovery and resilience plan.

In addition, the ICA published a specific [notice to detail how it would apply the newly-established settlement procedure](#). The notice broadly mirrors the [European Commission Notice on the conduct of settlement procedures](#), with a few tweaks to take into account the different legislative framework. For example, since the Italian settlement procedure is applicable not only to cartels but also to violations of EU or national competition law more generally, the reward for participation in a successful settlement procedure is differentiated in advance: while the fine will be reduced by 10% for cartel settlements (just like before the Commission), settlement procedures for any other antitrust violation will result in a 20% reduction. In addition, the ICA will not explore the parties’ interest in launching settlement discussions before the expiry of the 3-month deadline after the opening of proceedings at the disposal of the parties for submitting commitments.

In 2023, the ICA also applied for the first time some of the powers conferred by the 2021 Competition Law (on which we had already written [in this post](#)). More precisely, the ICA requested for the first time the notification of a yet unclear number of concentrations that were deemed capable of impairing competition in Italy despite not meeting the ordinary (cumulative) notification thresholds. In addition, the ICA fined two undertakings for having failed to timely reply to two requests for information issued while investigating a concentration (cases [C12476B](#)

and C12476C).

The new [2022 Competition Law](#) entered into force on 31 December 2023. Its focus, in line with geopolitical events and the energy transition, was the development of the electricity grid and the de-regulation of electricity bills paid by most of small consumers. At the same time, the deadline for the ICA's "phase II" merger investigations was extended from 45 to 90 days, and the ICA was designated as the national competent authority to cooperate with the Commission in the enforcement of the Digital Markets Act.

In June 2023, the ICA published its [proposals on competitions reform](#) for the future 2023 Competition Law. Such proposals concern a wide range of economic activities, including motorway concessions.

Digital and telecoms

In the [digital sector](#), the ICA closed with commitments an investigation against Google (case [A552](#)) for potentially raising barriers to the identification of interoperability mechanisms to make data available to competing platforms. In the ICA's view, this conduct could essentially impair the right to data portability provided by Art. 20 of the GDPR, and therefore restrict competition by impacting the access to such data by Google's competitors. To resolve these concerns, the ICA made binding three commitments offered by Google for 5 years. The ICA decision in this case highlights once more the interrelations between competition and data protection laws, especially in markets governed by access to and usage of big data.

In the [telecom sector](#), the project of a possible Single Broadband Network infrastructure merging the two competing infrastructure operators FiberCop and Open Fiber continues to keep competition lawyers active. As recalled in [last year's post](#), the ICA had closed with commitments the [I850-I850B investigation](#) on the agreements granting access to the broadband infrastructure of FiberCop. The competitor Open Fiber challenged this decision before the administrative court of first instance competent for competition matters ("*TAR Lazio*"), which [dismissed the action](#), reiterating in particular that the deadline of 3 months since the opening of proceedings to submit commitments to the ICA is not mandatory and can be extended by the ICA.

In addition, with the goal to transition to a service company, Telecom Italia will transfer its broadband primary network to FiberCop, which already owns the broadband secondary networks of Telecom Italia and other operators, and will sell its interest in the company – re-branded as NetCo – to the investment firm KKR and the Italian State. The transaction, which will be subject to merger and foreign subsidies control at EU level, will likely shed more light on the conditions for access to and control of the broadband infrastructure underpinning the digital transition.

Sport

In the [sport sector](#), DAZN, just before winning the broadcasting rights for the Serie A football championship for the 2021-2024 period, entered into an exclusive agreement with Telecom Italia for the broadcasting of the matches requiring DAZN not to partner with any other telecom operator, so that the bundle of connectivity services and audiovisual content offered by Telecom

Italia could not be replicated by its competitors. The ICA deemed the agreement to be detrimental to the competitive dynamics in several markets for connectivity services and retail sale of pay-TV, and fined both companies (case I857).

Basic industries and pharma

As regards the manufacturing sector, the ICA imposed a fine on the Swedish group Roxtec for having enacted a complex exclusionary strategy aimed at hindering its closest competitor's activities and entry into the EU-wide market for modular sealing systems (case A538). More precisely, according to the ICA, Roxtec's strategy was composed of three conducts. First, Roxtec would have registered trademarks resembling the shape of Roxtec's products in order to protect them from competition (after their main patent had expired in 2010), although EU trademark law prevents the granting of a monopoly on signs which consist exclusively of the shape or other characteristics of a product necessary to obtain a technical result. Second, Roxtec would have used such trademarks to initiate legal actions against its closest competitor, for trademark infringement and unfair competition. Third, Roxtec would have engaged in additional conducts aimed at disparaging the same competitor and its products. The ICA qualified the three conducts as part of a single and continuous violation of Art. 102 TFEU. The case is particularly noteworthy because it highlights the strong connection between competition law and intellectual property rights in general (not only patents, which are time-limited).

In the pharmaceutical sector, the *TAR Lazio* confirmed the ICA's conclusion that Leadiant Biosciences had applied excessive prices in relation to an orphan drug (we had already discussed the ICA's finding in case A524 in a [previous post in this blog](#)). The *TAR Lazio* concluded that the ICA correctly assessed the applicable regulatory framework and identified that the relevant market was limited to the medicinal products for the treatment of cerebrotendinous xanthomatosis with the active pharmaceutical ingredient *chenodeoxycholic acid* (CDCA). In addition, the *TAR Lazio* also concluded that the ICA correctly (i) qualified as abusively dilatory Leadiant's conduct during the pricing and reimbursement negotiations with the Italian Medicines Agency, and (ii) applied the *United Brands* test to conclude that the prices practiced by Leadiant for CDCA were abusive in light of the excessive difference with the cost actually incurred by Leadiant and of the fact that such prices were unfair in themselves.

Transport

In the transport sector, the ICA closed with commitments an investigation (case A551) against the main national railway company (Trenitalia) for allegedly tying its regional and long-distance rail passenger services (mostly still operated under monopoly) with its high-speed rail passenger services (operated in competition with the private operator NTV). According to the ICA, Trenitalia had engaged in a constructive refusal to supply and, although NTV and Trenitalia had entered into a contract allowing NTV to sell tickets "combining" fares of its own high-speed rail passenger services with Trenitalia's regional routes, Trenitalia could have delayed abusively the negotiations and could have ultimately imposed to NTV contractual clauses that were much more restrictive than those applied to other companies (such as on line travel agencies), thereby significantly raising NTV's costs. To resolve these concerns, the ICA made binding a set of commitments

offered by Trenitalia and enhancing interoperability between NTV's high-speed rail passenger services and both long-distance and regional rail passenger services offered by Trenitalia (and two companies participated, but not controlled, by Trenitalia). In the ICA's view, these commitments will eliminate a potential discrimination between Trenitalia and NTV in the sale of "combined" tickets, thereby promoting competition on rail passenger services.

In November 2023, Lufthansa and the Italian Ministry of Economy filed a merger control notification to the Commission for the acquisition of joint control over ITA Airways, the Italian State-owned airline company (case [M.11071](#)). ITA inherited the assets of ailing Alitalia, which was the subject of several State aids over the years. Notably, in 2023 the General Court rejected two actions by Ryanair aimed at annulling the Commission's State aid decisions authorising two tranches of Covid-19 aids to Alitalia (cases [T-225/21](#) and [T-333/21](#)). However, at the same time, the Commission requested the recovery of a previous aid of EUR 400 million granted to Alitalia back in 2019 (decision [SA.55678](#)). Such recovery is directed towards the recipient Alitalia, which however transferred its assets to ITA. Notably, at the time of the transfer, the Commission assessed that the transfer of the assets of Alitalia to ITA did not lead to economic continuity (decision [SA.58173](#)). Still, 2023 witnessed three judgments by labour courts compelling ITA to hire workers laid off by Alitalia, precisely on the assumption of the economic continuity. For this reason, in order to prevent the prospect of the recovery of the aid granted to Alitalia from ITA and to safeguard the envisaged sale to Lufthansa (which has the option to purchase the full capital of ITA in the future), the Government adopted [Decree-Law No. 131 of 2023](#), whose Article 6 excludes the continuation of the employment relationship with the purchaser of company assets, where the lack of economic continuity was ascertained by Commission decision.

In addition, the ICA conditionally cleared the acquisition by Italiana Petroli of all Exxonmobil's assets and activities in Italy connected with the refining, commercialisation and distribution of petroleum products (excluding lubricants and other chemicals). The ICA had opened an in-depth investigation (case [C12535](#)) because of its concerns that the transaction could significantly impede effective competition in the markets for the extra-network sale of petroleum products (separated between wholesale and retail, and segmented by type of product), and in the markets of distribution of motor fuels (separated between on-motorway and off-motorway stations). While at the same time conducting a sector inquiry on the prices of motor fuels (case [IC54](#)), the ICA assessed for this concentration thousands of local markets. After its in-depth investigation, the ICA cleared the transaction subject to a set of remedies, including (i) the revision of the target's wholesale supply contracts in the 532 competitively critical areas identified by the ICA, so that the concerned (otherwise exclusive) customers could purchase 30% of their fuel needs from third parties, (ii) the offer for 5 years of predefined amounts of fuels for B2B sale at a cost-based price, and (iii) the offer for 15 years of predefined capacity for third-party fuel storage and transit at a fair and non-discriminatory price.

New and rendered preliminary references

Also preliminary references contributed to the developments of competition law and policy in Italy in 2023. Indeed, as we had announced in [a previous post on this blog](#), in 2023 the administrative court of last instance ("*Consiglio di Stato*") delivered its judgment on the *Unilever* case. Taking stock of the Court of Justice in case [C-680/20](#), the *Consiglio di Stato* concluded that the ICA correctly deemed Unilever liable for the conducts (including exclusivity clauses and rebates) that

Unilever essentially obliged its distributors to enact vis-à-vis the retailers. In addition, the *Consiglio di Stato* confirmed that the ICA had not ignored the as-efficient competitor test submitted by Unilever, and had taken it into due account by concluding that it was not applicable to the overall conduct contested to Unilever (also because such conduct included non-price components).

On a separate note, the *Consiglio di Stato* requested a preliminary ruling in relation to the *Android Auto* case. To support electric mobility, Enel X (controlling the main network of charging columns in Italy) had developed a mobile app called JuicePass to search for charging columns, navigate till there, book and manage a charging session, and pay for it. Although Enel X had requested Google to make JuicePass available on Android Auto (thereby making it possible for drivers to use JuicePass more practically while driving electric cars), Google refused, thereby self-preferring its own app Google Maps which could be used on Android Auto to search and navigate till charging columns. The order for reference (case [C-233/23](#)) includes 5 different questions focussed on whether the requirements to consider a refusal to supply abusive are to be declined differently in the digital sector.

Also the *TAR Lazio* lodged a preliminary ruling request to clarify whether Article 102 TFEU, read in conjunction with the principles of protection of competition and effectiveness of administrative action, must be interpreted as meaning that it precludes the requirement under the Italian legislation for the ICA to open proceedings for abuses of dominance within 90 days from when the ICA has knowledge of the essential elements of the infringement (case [C-511/23](#)). The matter has been discussed in [another post in this blog](#) and a twin preliminary question was lodged in the context of unfair commercial practices (case [C-510/23](#)).

The topic of economic continuity between Alitalia and ITA is also the subject of two preliminary questions raised by a regional administrative court (case [C-588/23](#)). The questions concern the identification of the persons required to repay the aid and wonder whether, where the Commission had already identified the beneficiary of the aid, the national authority can still identify a different person based on the assessment of economic continuity between undertakings. The same question is reiterated for the case where the national authority identifies a person other than the addressee of the recovery decision, which did not participate in the procedure before the Commission and, consequently, does not have legal standing to challenge the decision before the General Court.

Overall, in 2023 the Court of Justice registered [10 new preliminary references](#) raised by Italian courts on competition matters, including those just mentioned, doubling the figure registered in 2022. Instead, as in 2022, the Court delivered [6 preliminary rulings](#) on competition law originating from Italian courts, including the *Unilever* case mentioned.

Private enforcement

Lastly, also national non-administrative courts contributed to the development of competition law and policy in Italy.

For example, the Italian Supreme Court (“*Corte di Cassazione*”) delivered several judgments confirming that actions for antitrust damages are based on tort, and the 5-year limitation period applies even when the antitrust infringer and the victims had entered into a contract (which would otherwise extend to 10 years the limitation period for any liability arising therefrom). In addition,

in January 2023, the same *Corte di Cassazione* confirmed that, when the Damages Directive could not be applied yet, the limitation period could start running also before the publication of an ICA Decision ascertaining an antitrust infringement (and could run even during the ICA's investigation).

Also, in May 2023 the court of Milan confirmed that the limitation period for antitrust damages actions based on Commission Decisions may start running as from the publication of their summary on the EU Official Journal, when the information previously published did not allow the victims to identify (i) the antitrust infringement, (ii) the responsible undertakings and (iii) the damages that they may have suffered. The judgment is noteworthy also because it ascertained a cartel on the basis of both a Commission Decision and a stand-alone claim. When assessing the effects of the cartel and albeit the Damages Directive could not be applied to the specific case, the court rejected the passing-on defence (because, albeit “*somehow inevitable*”, the passing-on was not proven and probably could not be proven due to the long duration of the cartel and the many years that had passed since its end). The court also ascertained a 2-year lingering effect (for a cartel that had lasted almost 30 years) and an overcharge ranging between 16% and 39.5%.

Conclusion

This non-exhaustive recollection of decisions and cases shaping competition law and policy in Italy in 2023 is open to discussion and integration. We are looking forward to your comments and views. And if this was 2023, no less is expected from 2024.

Disclaimer: *The views set out in this post are the authors' own and do not necessarily reflect the official opinion of the European Commission.*

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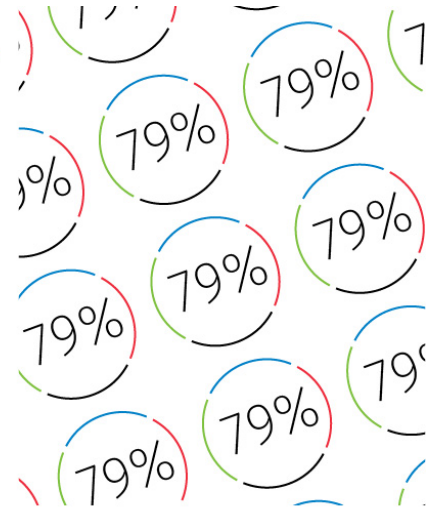
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